BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

STEPHEN BEVENS	)	
Claimant	)	
V.	)	
	)	
DREAM TEAM PIZZA	)	CS-00-0448-667
Respondent	)	AP-00-0451-372
AND	)	
	)	
PREVISOR INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

The claimant, Stephen Bevens, through Roger Fincher, appealed Administrative Law Judge (ALJ) David Bogdan's preliminary Order dated May 28, 2020. Bruce Levine appeared for the respondent, Dream Team Pizza, and its insurance carrier, Previsor Insurance Company (respondent).

RECORD

The record consists of the preliminary hearing transcript dated May 27, 2020, the exhibits thereto, the case file and the parties' briefs.

ISSUES

The issues are: (1) is the claimant disallowed compensation because his injury was due to horseplay; (2) if so, did the ALJ have jurisdiction to award unauthorized medical expense; and (3) may the Board address the constitutionality of the horseplay statute?

FINDINGS OF FACT

The claimant was a delivery driver for the respondent, a Domino's Pizza, for almost one month. He was not scheduled to work on October 6, 2019, but was there to talk to a manager. Someone asked the claimant to work and he agreed to help with deliveries.

The claimant rode as a passenger with Christian Staten (Staten) to deliver pizzas. At the time, the claimant was age 26 and Staten had turned 18 years-old two weeks earlier. The claimant testified he believed Staten was a manager. While the claimant did not know Staten's job title, he indicated Staten was a manager when there were no other managers.

Staten and the claimant delivered a pizza and returned to the car. The claimant tried to get into the passenger side door, but the door was locked. The claimant testified he did not remember anything else until realizing he was at the Stormont Vail emergency room (ER). His mother took him home, but brought him back to the ER early the next morning. She was concerned he was lethargic and sleepy. The claimant felt unwell and complained of a headache. The claimant provided the following history to hospital staff:

> He and a friend of his were delivering pizza. The friend was driving away while the patient still had his hand on the car. As the friend was pulling away, he looked backwards and noted the patient lying on the ground. The friend returned and found the patient lying on the ground unresponsive for several minutes. The friend brought him to the emergency room. The patient left because of "long wait time".[1]

While at Stormont Vail, a CT scan of the claimant's head showed an intracranial hemorrhage and an occipital skull fracture. He was admitted for monitoring and discharged three days later. The claimant received additional treatment elsewhere.

A "Kansas Motor Vehicle Crash Report" completed by Officer Hayden states:

> On Sunday, . . . Christian Staten . . . and [Stephen] Bevens . . . , delivered a Domino's Pizza to 5000 SW Huntoon (Luther Place Apartment Homes). After returning to Staten's car in the parking lot, a green Ford Taurus, Bevens was witnessed riding on the hood of the car as Staten drove west through the parking lot and back towards SW Huntoon. While Staten was driving Bevens fell from the hood of the car and suffered a head injury. Staten took him to the hospital and he was later diagnosed with a closed fracture of the occipital bone, a subdural hematoma, a mild subarachnoid hemorrhage, and a traumatic brain injury.
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> Susan Holland . . . witnessed the incident. She saw Staten and Bevens go into the building and come back out to the waiting car. She saw Bevens go to the passenger side of the car and try to open the door. She didn't know if it was stuck, locked, or if Staten wouldn't let him in but they were talking to each other. She walked past them and heard the car start. It then drove past her westbound and she saw that Bevens was on the hood of the car. The driver stepped on the gas "fairly fast" to turn southbound to get to Huntoon. When the car turned Bevens rolled off. He hit the cement "really hard" and his glasses flew off as he rolled two or three times. Staten stopped and got out of the car. He walked over to Bevens and said, "Get up, get up, let's go, let's go, what's the matter, you playing a trick on me? Get up." Staten just laid on the ground face up, not moving. Staten shook Bevens awake and put him in the passenger side of the car before taking off "real fast" going west on Huntoon. He told Holland that he was taking Bevens to the hospital. Holland called 911 and Police arrived at the scene but did not make contact with Staten or Bevens.

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[1] P.H. Trans., Resp. Ex. B2 at 1.

> Bevens has only vague recollections of the incident and said he didn't know how or why he ended up on the hood of the car.
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> Staten relayed to me that he and Bevens rode together to make some pizza deliveries. They took the delivery inside when they got to Luther Place. He explained that the "keypad" on his car broke off so he has to unlock the door with the key so none of the other doors unlock (automatically.) He said, "At first it was all just fun and games, we were messing around." He said that he unlocked the car but forgot to unlock the passenger door. Bevens was, "sitting there looking down, we're having a good time just laughing about it." He made Bevens stand there a minute and was joking around doing "normal stupid teenage stuff." Bevens got on the hood of the car and he started driving. Staten then stopped the car. He said, "It's not like I slammed on the brakes or nothing but I stopped and he fell off. That's when it all went bad." He said he stopped the car immediately and knew he didn't run over Bevens. He didn't see everything that happened but he saw him fall.
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> He got out of the car and started laughing because he thought Bevens was joking at first. He soon realized it was time to be serious and called 911. Bevens came to and Staten took him to the hospital. He said he felt bad because it was his fault and Bevens was his responsibility. I pointed out that, looking back, it seemed like he didn't [feel] this was a very good idea. He replied, "No sir it wasn't."[2]

At the hearing, the claimant was asked if he denied being on the hood of Staten's car. He responded, "I said I don't know what happened. I don't even remember trying to open the door, and then next thing I know I'm at the hospital."[3] The claimant agreed getting on the hood of a moving car is not a pizza delivery driver's job duties and doing so would be stepping away from what a delivery driver does. The claimant agreed a person getting on the hood of a moving vehicle is hazardous and likely to result in serious injury.

The claimant has a history of pseudoseizures, but testified it has been years since his last one. There is some discussion in the Stormont Vail records showing the claimant may have had a seizure on the day of the accident, but there is no such medical conclusion. The claimant denied having a seizure on the day of his accident. The claimant testified he continues to have headaches, depression, loss of taste and smell and memory problems/forgetfulness. The claimant does not think he is able to work.

At his attorney's request, the claimant saw Dr. Daniel Zimmerman. The claimant complained of symptoms from his traumatic brain injury and pain affecting his right knee. The claimant also complained of a loss of taste and smell. The doctor recommended additional treatment for residuals of the traumatic brain injury, including a neurologic evaluation. For the claimant's right knee, the doctor stated acetaminophen should be sufficient treatment. It was Dr. Zimmerman's opinion the prevailing factor for the traumatic brain injury and possible injuries affecting the cranial nerves was the accident.

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[2] *Id*., Resp. Ex. B1 at 5.

[3] *Id*. at 28.

Pages 3 and 4 of the ALJ's Order states:

> Claimant contends the co-employee driver of the vehicle caused the accident by controlling the speed of the vehicle, and that the co-employee was his supervisor. The co-employee (18 years of age) had been with the Employer longer than Claimant but there is no evidence the co-employee was a supervisor. In addition, Claimant voluntarily climbed on the hood of the vehicle as witnessed and stated in the Police report and Claimant admitted the hazardous nature of that activity.
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> Respondent relies on the Police report issued which is based on the comments of an eye witness, the comments of the driver/co-worker, and the comments of Claimant. Claimant was aware of talking with the Police but was not aware of any investigation. The Police report documents that Claimant didn't know how or why he was on the hood but he knew he was there. It further documents the "horseplay" event and there is no reference in the report that Claimant had a syncope episode and collapsed as referenced in the medical records and from Dr. Zimmerman's report.
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> Based upon review of the record, testimony provided, and the arguments of counsel, the Court is persuaded that Claimant's actions amounted to "horseplay", and finds against Claimant in his demand for compensation and specifically additional medical care as it relates to this accident.
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> Claimant has submitted a demand for unauthorized medical pursuant to K.S.A. 44-510h(b)(2) for up to $500 relating to the second opinion from Dr. Zimmerman and based upon the exhibits supporting this demand, Respondent shall satisfy this demand.

PRINCIPLES OF LAW

Kansas workers compensation appellate cases emphasize literally interpreting and applying plainly-worded workers compensation statutes.[4] Information outside a statute's plain wording should not be added.[5]

Under K.S.A. 44-501b: (1) an employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment; (2) the trier of fact considers the whole record; and (3) the burden of proof is on the worker. An employer must prove any affirmative defenses.[6]

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[4] See *Hoesli v. Triplett*, 303 Kan. 358, 362, 361 P.3d 504 (2015).

[5] See *Douglas v. Ad Astra Info. Sys., L.L.C.*, 296 Kan. 552, 293 P.3d 723 (2013).

[6] See *Johnson v. Stormont Vail Healthcare, Inc.*, 57 Kan. App. 2d 44, 445 P.3d 1183 (2019), *rev. denied* ___ Kan. ___, ___ P.3d ___ (Feb. 25, 2020).

K.S.A. 44-508 states, in part:

> (d) "Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.
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> . . .
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> (f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.
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> . . .
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> (B) An injury by accident shall be deemed to arise out of employment only if:
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> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
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> (ii) the accident is the prevailing factor causing the injury, medical condition and resulting disability or impairment.

Bryant[7] states an injury by accident arises out of employment when the activity resulting in injury is connected to, inherent in, or in the overall context of performing work. The plain language of K.S.A. 44-508(f)(2)(B)(i) states an injury by accident arises out of employment only if there is a causal connection between the conditions under which the work is required to be performed and the resulting accident.

K.S.A. 44-501 states:

> (a) (1) Compensation for an injury shall be disallowed if such injury to the employee results from:
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> . . .
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> (E) the employee's voluntary participation in fighting or horseplay with a co-employee for any reason, work related or otherwise.

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[7] *Bryant v. Midwest Staff Solutions, Inc.,* 292 Kan. 585, 595-96, 257 P.3d 255 (2011). Cases pertaining to legislative amendments effective May 15, 2011, follow *Bryant*. See *e.g., Moore v. Venture Corp.*, 51 Kan. App. 2d 132, 140, 343 P.3d 114 (2015).

A worker voluntarily participating in horseplay with a coworker is precluded from receiving compensation, while an unwilling or nonparticipating victim of horseplay can receive compensation for a horseplay injury.[8]

ANALYSIS

1. The claimant is disallowed compensation because he voluntarily participated in horseplay with a coworker.

The claimant, a pizza deliverer, was injured when he slid off the hood of a delivery car driven by a coworker. The ALJ denied benefits because the claimant's injury was caused by horseplay. The claimant argues he was not engaged in horseplay and his injury arose out of and in the course of his employment because he was in the process of getting into the delivery vehicle, an activity inherent in delivering pizza. He further argues the horseplay statute is unconstitutionally vague and overbroad, but acknowledges the Board may not address the constitutional argument. The respondent maintains the Order should be affirmed, except the ALJ should not have awarded unauthorized medical to the claimant.

Staten indicated he and the claimant were engaged in fun and games, having a good time, messing around and laughing about the claimant not being able to get into the car. To this Board Member, the two workers were engaged in horseplay. The claimant was not performing a job task when he got on the hood of the vehicle he and Staten used to deliver a pizza. Staten told the police he started driving after the claimant got on the hood of the vehicle. Holland told the police she saw the claimant on the hood as the car drove past her. It is not fully understood why the claimant was on the hood of the car, but he was on the hood and he was seriously injured as a result.

The claimant, in his brief, asserts he was injured in the process of attempting to get into the car, a task inherent to his job. The undersigned respectfully disagrees. The claimant was on the hood of a car, an activity wholly inconsistent with his job as a pizza delivery worker. Being on the hood of a car is simply not an attempt to get into the car.

The claimant cites *Fishman*[9] as supporting his case. There, Fishman, a paraprofessional, was expected to watch a special education student in a gym. Other students and paraprofessionals were present. Fishman understood her job also involved getting the students involved in physical activity. She and others engaged in basketball, football, golf, and volleyball. Fishman sustained injury when attempting to catch a football, a general activity for that day.

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[8] See *Coleman v. Armour Swift-Eckrich*, 281 Kan. 381, 388, 130 P.3d 111 (2006).

[9] *Fishman v. U.S.D. 229*, No. 118,327, 2018 WL 3485612 (Kansas Court of Appeals unpublished opinion filed July 20, 2018).

Fishman states:

> K.S.A. 2017 Supp. 44-501(a)(1)(E) disallows compensation for an injury if it results from "the employee's voluntary participation in fighting or horseplay with a co-employee for any reason, work related or otherwise." Somewhat surprisingly, there is no statutory definition of horseplay in Kansas, either under the workers compensation law or elsewhere. Likewise, we have been unable to locate any Kansas caselaw which specifically embraces a particular definition. Notably, our Supreme Court recently held that, in the context of a civil battery lawsuit, the idea of horseplay is a "nebulous concept" which has "no legal meaning." *McElhaney v. Thomas*, 307 Kan. 45, Syl. ¶ 4, 56, 405 P.3d 1214 (2017). Turning to colloquial sources, the dictionary defines horseplay as "rough, boisterous play." Webster's New World College Dictionary 703 (5th ed. 2016).[10]

Fishman next provides several examples of horseplay from case law, including a worker kicking or placing his foot on a spinning tire balancing machine to disrupt a coworker's readings, a worker being injured after "bear-hugging" another employee, dumping a coworker out of her chair, trying to lift large rolls of waxed paper overhead, trying to shock a coworker with an electrically charged wire fastened to a metal door, and throwing mortar at a coworker. The Court of Appeals noted these cases involved potentially hazardous activities and showed the claimants stepped away from their job duties and interfered with their coworkers' abilities to do their job duties. Fishman was injured performing her job duties, which included catching a football. It is unclear how her actions interfered with the work of other employees.

Riding on the hood of a car is obviously dangerous and removed the claimant from his employment. Supposing *Fishman* expects the claimant's actions to interfere with a coworker's job, Staten's job was disrupted by having to take the claimant to the hospital.

The claimant willingly and voluntarily engaged in horseplay resulting in his injury. K.S.A.44-501(a)(1)(E) precludes an order of compensation.

For completeness, the undersigned Board Member finds it unlikely Staten was the claimant's supervisor or manager.

2. The claimant correctly noted the Board cannot address the constitutionality of the horseplay statute.

"[T]he Board . . . lacks the authority to rule on the constitutionality of any statute, including K.S.A. 44-501 *et seq.*, the Workers Compensation Act (the Act)."[11]

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[10] *Fishman*, 2018 WL 3485612, at *5.

[11] *Pardo v. United Parcel Serv.*, 56 Kan. App. 2d 1, 10, 422 P.3d 1185 (2018).

3. The ALJ exceeded his authority to award unauthorized medical after finding compensation for an injury was disallowed based on horseplay.

Under K.S.A. 44-534a(a)(2), an ALJ has the authority to award unauthorized medical following a preliminary hearing, but such authority must be based "[u]pon a preliminary finding that the injury to the employee is compensable. The Board has jurisdiction when the ALJ exceeds his or her jurisdiction.[12]

Once the ALJ denied compensation based on the horseplay defense, no authority remained to award unauthorized medical. Accordingly, the award of up to $500 in unauthorized medical is vacated.[13]

CONCLUSIONS

This claim for compensation is disallowed because the claimant's injury occurred as a result of voluntary horseplay. The Board may not address the constitutionality of the horseplay statute. If compensation is disallowed due to horseplay, the ALJ may not award unauthorized medical. Therefore, the award of unauthorized medical is vacated.

WHEREFORE, the Board affirms in part and reverses in part the May 28, 2020, Order.[14]

IT IS SO ORDERED.

Dated this _____ day of July, 2020.

_____
HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

Electronic copies via OSCAR to:
Roger Fincher
Bruce Levine
Honorable David Bogdan

[12] K.S.A. 44-551(l)(2)(A).

[13] See *Whitmer v. Spirit Aerosystems, Inc.*, No. 1,065,647, 2014 WL 517232, at *5 (Kan. WCAB Jan. 9, 2014); see also *Hull v. Saberliner Independence*, No. 210,556, 2001 WL 1725695, at *2 (Kan. WCAB Dec. 31, 2001).

[14] The above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2019 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.